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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 720

ELMER J. SCHNACKENBERG,
Petitioner,

vs.

ROLAND TOWLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in the above entitled case on February 15, 1955.

OPINIONS BELOW.

The opinion of the trial court is unreported (R. 3, pp. 34-45). The opinion of the Illinois Appellate Court is reported in 351 Ill. App. 497, 115 N. E. 2d 813 (1st District, 1953). The opinion of the Illinois Supreme Court is found in 4 Ill. 2d 561; 123 N. E. 2d 817 (1955). All three opinions are reprinted in the appendix to this petition.

JURISDICTION.

The final judgment of the Illinois Supreme Court was entered February 15, 1955, when a motion to reconsider the petition for rehearing was denied. The petition for rehearing was denied January 18, 1955.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3). The federal questions here involved arose for the first time out of the decision of the Illinois Supreme Court reversing the decisions of the trial and appellate courts and were raised by this petitioner in his petition for rehearing and again in his motion for reconsideration of the petition for rehearing.

QUESTIONS PRESENTED.

1. Whether a state court may retroactively impose additional restrictions upon a license to practice law theretofore issued by it curtailing the rights granted to a lawyer by said license, thereby effecting the nullification of a contract entered into by him pursuant to said license and depriving the lawyer to that extent of his property without due process of law, in violation of Amendment XIV of the Constitution of the United States.

2. Whether a state court may promulgate a new public policy contrary to public policy theretofore existing, basing such new public policy solely upon the court's own opinion as to propriety, although the constitution, statutes, judicial decisions and all other factors which determine the previous public policy of the state remain unchanged, the court thereby effecting a nullification of a contract made nine years before the new public policy was announced, said nullification resulting in a taking of the property of one of the contracting parties in his license and his contract without due process of law.

3. Whether procedural due process of law and equal protection of the law are accorded a litigant when a reviewing court (1) makes a finding of fact based upon evidence to which objection was sustained by the trial court and in respect to which no error was assigned on appeal; (2) considers as a part of the case an issue not raised by the pleadings; (3) refuses to consider its controlling and unrepudiated decisions repeatedly called to its attention by an appellee; and (4) makes findings of fact at variance with those of the trial and appellate courts although it is settled law that the findings of those courts should not be set aside.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions and statutes involved are: the Fourteenth Amendment to the Constitution of the United States; Article VI, section 16 of the Constitution of the State of Illinois, and chapter 13, sections 1 and 10 of the Illinois Revised Statutes. The provisions of the Illinois Constitution and the Illinois statutes are reprinted in the appendix hereto.

STATEMENT.

For over half a century prior to the decision of the Illinois Supreme Court in this case, the law of Illinois permitted a judge to engage in the practice of law in the manner here involved. The contract between the parties before the Court in the present case was made under that established law. The trial court applied the decisions upon which petitioner had relied and rendered a decree in his favor. The Illinois Appellate Court, likewise applying the established law, affirmed the judgment. The Illinois Supreme Court reversed the decree and by its opinion expressly overruled its prior decisions, and imposed "ad-

ditional restrictions" upon the practice of law by judges. It imposed those additional restrictions retroactively and thereby declared illegal and void the contract made nine years before the decision was announced. As a result, the decision of the Illinois Supreme Court permits respondent to retain the entire proceeds resulting from years of labor by petitioner under the terms of the contract, and deprives petitioner of his agreed portion thereof.

In May, 1945, Schnackenberg accepted employment from the Norton Company to serve as its lawyer in a matter connected with the Illinois sales tax which was required by statute to be litigated in the Circuit Court of Sangamon County, Illinois, located in Springfield, which is about 200 miles from Chicago. Schnackenberg was then a candidate for the office of judge of the Circuit Court of Cook County located in Chicago, and Towle, the respondent, was his law partner and fully informed as to all the facts. The parties agreed that the fees should be divided two thirds to Schnackenberg and one third to Towle. Schnackenberg became a judge soon after the work began. The work continued from May, 1945, until after the decision of the United States Supreme Court on February 26, 1951.

Schnackenberg supervised the handling of the case and worked upon the preparation of briefs and other documents filed in court, but he never personally appeared in any stage of the proceedings and his name never appeared upon any brief or document filed in any court or elsewhere. He performed all of his duties as a judge and the Supreme Court of Illinois stated in its opinion that petitioner accepted the employment by Norton Company in complete good faith and that he did not use his office as judge to further it. No other instance of practice by Schnackenberg while a judge is shown.

Norton Company paid $10,000 on account of the fees in 1946 or 1947 and an additional $40,000 in 1951. Both fee payments were received by Towle alone. He divided the $10,000 as agreed but refused to pay Schnackenberg any part of the $40,000 (R. 3, pp. 29-32), and Schnackenberg sued for an accounting.

Towle defended, saying (1) Schnackenberg did no work and that Towle had done it all; and (2) that it was illegal for Schnackenberg to practice law and therefore he could not recover a share of any fees thus illegally earned (R. 3, pp. 32-33). The trial court found as a fact that Schnackenberg did the work required of him and held as a matter of law that it was not illegal for Schnackenberg to practice law in the Norton matter after he became a judge (R. 3, pp. 32-33). The Appellate Court affirmed. 351 Ill. App. 497, 115 N. E. 2d 813 (1st District 1953).

Towle petitioned the Supreme Court of Illinois for leave to appeal, contending that Schnackenberg violated the law of Illinois by practicing law after he became a judge of the Circuit Court of Cook County. Leave to appeal was granted.

The trial court and the Appellate Court both had found that the law of Illinois, as declared by its constitution, its statutes and the reported decisions of its highest court, did not prohibit a judge of the Circuit Court of Cook County from practicing law in any court except only the Circuit Court of Cook County, being the court in which he was commissioned.

The Supreme Court of Illinois reversed. In so doing the Supreme Court expressly overruled in their pertinent points its earlier decisions (*Town of Bruce* v. *Dickey*, 116 Ill. 527, 6 N. E. 435, and *O'Hare* v. *Chicago, Madison & Northern Railroad Co.*, 139 Ill. 151, 28 N. E. 923) which the lower courts had held to be determinative of the issue. 4 Ill. 2d 561, 570; 123 N. E. 2d 817, 821.

Speaking of the *Dickey* and *O'Hare* cases, the court said that it does "not subscribe to the conclusion that the two cases are determinative in the matters of public policy arising under the facts of this case." The court further stated that those cases would not preclude "this Court, in a proper case," from imposing "additional restrictions." 4 Ill. 2d 561, 566; 123 N. E. 2d 817, 819.

WHEN AND HOW FEDERAL QUESTIONS WERE RAISED.

Petitioner was successful in the trial court and the Appellate Court of Illinois. When the Supreme Court of Illinois reversed, a petition for rehearing was filed, which was the first time there was any reason for petitioner to make his contention that his rights had been violated. The petition for rehearing contains the following (R. 15) wherein petitioner said (page 3):

> "The contract with the Norton Company has been fully performed and the fee delivered by the client to defendant for the use of both plaintiff and defendant.
>
> "To now permit defendant to keep all of this fee, giving no part of it to plaintiff, is so harsh that a court of equity will not let such an unconscionable result occur."

And again on page 10 of the petition:

> "Obviously the imposition of additional restrictions is a change in the existing law. To carry the effect of this change in the law back nine years is to invalidate plaintiff's employment in 1945 and is contrary to the rudiments of American jurisprudence. The validity of a contract should be determined by the law in effect when the contract was made. The announcement of new law in the form of additional restrictions applied with retrospective effect and resulting in the destruction of rights under an employment entered into in good faith at a time when such restrictions did not exist is abhorrent to fundamental principles of law

and equity. In the language of a layman, it is not fair play."

In petitioner's motion for reconsideration of petition for rehearing the following appears (R. 20):

> "In reversing the law as determined by the *Dickey* and *O'Hare* cases, the court has established a new rule to which it has given retroactive effect. But no reason is stated why the court desires to render illegal a contract entered into in 1945 and to deprive plaintiff of the fruits of years of labor and responsibility. As indicated in plaintiff's petition for rehearing (pages 2-3), the authorities plainly permit this Court to make its 'additional restrictions' effective only in the future. Retroactive overruling of settled precedents is particularly harsh when property or contract rights have been based thereon."

It thus clearly appears from the foregoing that in his petition for rehearing and his motion to reconsider such petition after it had been denied, petitioner urged, in substance, that his constitutional rights had been unlawfully violated.

This Court, in *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113 (1935), held that the proceedings in the Pennsylvania state courts revealed that a federal question was involved, took the case and held a Pennsylvania statute unconstitutional because it violated the federal constitution, although at no time in the state courts was the word "constitution" used by the appellant. That the federal question involved solely the national constitution is shown by the language of Justice Cardozo, in dissenting, at page 126, and the language of the unanimous decision of the court when the same case again appeared before this Court in *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506 at 512 (1938).

ARGUMENT.

1. The federal constitutional question was seasonably raised.

Since petitioner was successful in the trial and the Appellate courts, the first need for an assertion by him that his rights had been invaded occurred when the Supreme Court of Illinois handed down its opinion imposing new and additional restrictions on his license to practice law, by overruling its decisions and announcing a new public policy. It was then that petitioner, in his petition for rehearing and in his motion to reconsider the same, seasonably urged that his fundamental rights were violated.

2. The violation of petitioner's rights does not arise out of contrary constructions by a court of the same statute made at different times, but such violation occurs because the court arbitrarily stated a new public policy contrary to that which admittedly existed when petitioner's contract was made.

In the case of *Fleming* v. *Fleming*, 264 U. S. 29 (1924), the court held that there would be no violation of Article I, section 10 of the federal constitution if a state court made successive contrary constructions of a state statute.

The *Fleming* case, insofar as this Court held that a federal question was involved, came to this Court upon a charge that the Supreme Court of Iowa had reversed its former rulings under which a certain kind of contract of partnership had been held valid and not avoided by a section of the Iowa code, and that on the faith of these rulings the instant partnership contract had been entered into, and that the new ruling of the same court, giving the statute a different construction, was an impairment of

the contracts of partnership in violation of Article I, section 10 of the federal constitution. This Court held that no new law was made by the last decision. The statute in question was the same law as originally enacted and hence there was no change in the law.

In the case at bar section 10 of Article I is not involved, nor did the Illinois Supreme Court hold that the interpretation of section 10, chap. 13, Ill. Rev. Stats., made by it in the case of *O'Hare* v. *Chicago, Madison & Great Northern Railroad Co.*, 139 Ill. 151, 28 N. E. 923, was incorrect. As a step in announcing a new public policy contrary to section 10 and the *O'Hare* case, and the constitutional provision (Article VI, section 16 Illinois Constitution of 1870) as construed in *Town of Bruce* v. *Dickey*, 116 Ill. 527, 6 N. E. 435, the court said that it did not subscribe to the conclusion that those two cases "are today determinative in the matters of public policy * * *." In the present case the Fourteenth Amendment to the federal constitution is relied upon, because the license of petitioner to practice law is property and the contract involved in this case is property. The Fourteenth Amendment protects property from the act of a state, either by its legislative or judicial departments, when it acts to change the law by "imposing additional restrictions" to those existing when the property was created, and this property is as much protected by the Fourteenth Amendment where the imposition of additional restrictions is in the guise of a judicial declaration of a new public policy first stated many years after the license was issued and the contract was made, as it would be were the change in law accomplished by a legislative enactment.

That a license to practice law is property probably needs no citation of authority. Some of the cases so holding are: *Montgomery County Bar Association* v. *Rinalducci* (1938) 329 Pa. 296, 107 A. 924; *Unger* v. *Landlords' Association*

(1933) 114 N. J. E. 68, 168 A. 229; *re Application for Admission to Practice*, 14 S. D. 429, 85 N. W. 992, 993 (1901).

It was similarly held as to licenses of other professions in: *Prouty, et al.* v. *Heron, et al.*, 127 Colo. 168, 255 P. 2d 755 (1953) (an engineer's license); and *Kelly* v. *State*, 139 Tex. Cr. 156, 138 S. W. 2d 1075 (1940) (medical doctor's license).

3. The public policy of the State of Illinois, and for that matter public policy generally, is found in the constitution and statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of government officials.

In the case of *Zeigler* v. *Illinois Trust and Savings Bank*, 245 Ill. 180, 91 N. E. 1041 (1910) at page 193 the court stated:

> "The public policy of the State or of the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials. (*Bell* v. *Farwell*, 176 Ill. 489; *Harding* v. *American Glucose Co.* 182 id. 551; *Brush* v. *City of Carbondale, supra; Hartford Fire Ins. Co.* v. *Chicago, Milwaukee and St. Paul Railroad Co.*, 70 Fed. Rep. 201; *Vidal* v. *Girard's Exrs.* 2 How. 127; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290.) Courts will not look to other sources to determine the public policy of a State. As was said in *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee and St. Paul Railroad Co. supra:* 'The public policy of a State or nation must be determined by its constitution, laws and judicial decisions,—not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public.' "

In *Muschany* v. *United States* (1944) 324 U. S. 49, the Supreme Court of the United States stated (page 66):

> "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

In *Twin City Co.* v. *Harding Glass Co.* (1931), 283 U. S. 353, the court was called upon to release one of the parties from the obligation of a contract on the ground of public policy. At page 357 the court said:

> "In determining whether the contract here in question contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily it is for the lawmakers to determine the public policy of the State."

4. Petitioner was deprived of property without due process of law.

By section 1 of the statute in regard to attorneys and counsellors (chap. 13, Ill. Rev. Stats.) the holder of a license to practice law was authorized "to appear in all of the courts within this state and there to practice as an attorney and counsellor at law * * *." By section 10 of said statute the legislature provided restrictions on the authority granted by section 1, as follows: "No person who holds a commission as a justice of the Supreme Court, or as judge of any court of record, shall be permitted to practice as an attorney and counsellor at law in the court in which he presides * * *."

After the decision in the *O'Hare* case, the legislature amended section 10 to conform to that decision and made it provide that no such judge "shall be permitted to practice as an attorney or counsellor at law in the court in which he is commissioned or appointed * * *."

The legislature, in section 10, stated restrictions on the practice of law by judges. We do not raise any question as to whether the state supreme court or the legislature

had or has exclusive right to act on this subject, because that is not a federal question. For the sake of argument we will assume that the court can act. However, if it acts by promulgating a rule, as the legislature acts by enacting a statute, then the court no more than the legislature can change the existing law retroactively to infringe or destroy property rights in existing licenses or contracts made prior thereto. It follows that it cannot do more by changing the law in a court decision between private litigants than it could do by making a rule, or more than the legislature could do by statutory enactment.

At the time petitioner made the contract with his partner, the respondent here, in 1945, this contract was valid and in full accord with the public policy of the State of Illinois determined according to the standards stated in the cases of *Zeigler* v. *Illinois Trust and Savings Bank*, 245 Ill. 180, 91 N. E. 1041 (1910); *Muschany* v. *United States*, 324 U. S. 49 (1944), and *Twin City Co.* v. *Harding Glass Co.* (1931), 283 U. S. 353, quoted above. Nevertheless the court announces a new public policy imposing "additional restrictions" and applies it to a contract made nine years before. There is no basis for this change except the opinion of a majority of the judges of the court, and it is submitted that, in the absence of a change in the constitution, laws and judicial decisions of the State of Illinois, the court constitutionally had no power to change arbitrarily the public policy of the state and make such policy retroactive to a date prior to the date of the decision.

5. Petitioner was not accorded procedural due process of law.

(a) The Supreme Court of Illinois states as a fact shown by the record testimony of respondent to which an objection was sustained. In view of the sustaining of the objection it would have been improper for petitioner to offer evidence refuting such testimony.

At the very beginning of the opinion of the Supreme Court of Illinois it prominently states that the recital of the facts in the Appellate Court opinion is inadequate and proceeds to state as a fact the substance of the very testimony of the respondent to which an objection had been sustained in the trial court and as to which respondent assigned no error. (Page 77 of abstract shown at page 3 of record here.) This testimony, by a distortion of facts, attempted to prove that prior to the execution of the contract between petitioner and respondent, petitioner represented that the Norton Company claim would be uncontested. It should be noted that respondent's answer raised no issue of this kind.

It is submitted that the trial court was right in sustaining the objection, but even if it erred in that regard petitioner at least should be entitled to an opportunity to controvert this evidence when the Supreme Court on appeal saw fit to consider it material in reversing petitioner's judgment.

The net result is that petitioner is damaged by evidence which he had no opportunity to controvert. He never had his day in court as to this alleged "fact" which the Illinois Supreme Court evidently thought important in deciding the appeal. This is not due process of law.

(b) The Supreme Court of Illinois considered as a part of the case an issue not raised by the pleadings.

As noted above, the Supreme Court of Illinois assumes as a proved fact the testimony of respondent to which an objection had been sustained because it was not material. (See page 77 of abstract at page 3 of the record.) This testimony was not material to any issue raised by the pleadings. It is not clear why the court refers to the testimony unless it be to avoid "an interpretation of the record" that "reflects most unfavorably" upon respondent. There is no issue of this kind in the case.

The reference to testimony not relevant to any issue raised by the pleadings shows that the court was considering some issue not in the record and unknown to petitioner, who, of course, had no opportunity to meet it at the trial level. This is not due process.

(c) The Supreme Court of Illinois refused to consider a relevant legal principle settled by its own decisions although it was called to the attention of the court as a pivotal point in petitioner's brief and reiterated in his petition for rehearing and his motion for reconsideration.

The Supreme Court of Illinois, in the case of *Oil, Inc.* v. *Martin* (1942), 381 Ill. 11 at page 19, 44 N. E. (2) 596, 600 states:

> "The rule has been laid down and followed that a partner, or one occupying a position of trust and confidence, may not by reason of the fact that money may have been earned out of an illegal transaction, be released from making an accounting for his associate's share, when all of the proceeds have fallen into his hands. (*Brooks* v. *Martin*, 69 U. S. 70, 17 L. ed. 732.) The court there points out there is a difference between enforcing an illegal contract and asserting title to money which has arisen from it. This case has been followed many times, and the principle recognized in *Groome* v. *Freyn Engineering Co.*, 374 Ill. 113; *Central Republic Trust Co.* v. *Evans*, 378 id. 58."

It has never been denied that petitioner and respondent were joint adventurers and that as such they occupied a fiduciary relation to each other. The record will show (R. 15 and 18) that the petition for rehearing and the motion for reconsideration were directed to this point, calling the court's attention to the fact that this point had been raised prominently in petitioner's brief.

Procedural due process requires that the relevant legal contentions of the parties be considered. This was denied petitioner by the Illinois Supreme Court in the present case.

(d) The Supreme Court of Illinois made a finding of fact at variance with that of the trial court and approved by the Appellate Court upon an issue that depended upon the credibility of witnesses.

The Supreme Court states in its opinion (page 563) that petitioner contributed very little to assist in the labors and responsibilities of following the litigation in question through the courts. This statement is directly contrary to the finding of the trial court (which actually heard the conflicting evidence upon that point) and that of the Appellate Court. The validity of the statement depends upon whether or not the testimony of petitioner or that of respondent was believed.

It is basic rule of procedure invariably followed in the courts of the nation that the findings of a trial judge upon an issue depending upon the credibility of witnesses will not be disturbed unless clearly erroneous. This principle is stated in Rule 52 of the Federal Rules of Civil Procedure and in a great many cases in practically all jurisdictions. A few late Illinois chancery cases stating the rule are: *Hanlon* v. *Hayes*, 404 Ill. 362, 89 N. E. 2d 51 (1949); *Dombrow* v. *Dombrow*, 401 Ill. 324, 82 N. E. 2d 47 (1948); *McCrillis* v. *Atterback*, 397 Ill. 550, 74 N. E. 2d 682 (1947); *Coppens* v. *Coppens*, 395 Ill. 326 at 332, 70 N. E. 2d 57 (1946).

In the present case this principle was not applied. It is submitted that failure to follow a rule so basic is a denial of due process.

CONCLUSION.

Petitioner's property rights were not violated until the Supreme Court of Illinois reversed the case. Petitioner thereafter seasonably asserted his fundamental rights.

It is submitted that the retroactive application of a new public policy deprives petitioner of property in his license to practice law and in the contract and violates substantive due process.

It is further submitted that petitioner was denied procedural due process when the Supreme Court of Illinois (a) considered as a proved relevant fact testimony to which an objection had been sustained so that petitioner had no opportunity to refute it; (b) considered some issue not in the record; (c) refused to consider a relevant legal principle which was repeatedly, specifically and directly pressed upon the court by petitioner's brief, his petition for rehearing and his motion for reconsideration; and (d) made a finding of fact at variance with that of the court that heard the testimony and saw the witnesses upon a material issue that depended upon the credibility of witnesses.

For these reasons petitioner prays that a writ of certiorari issue out of this Court to the Supreme Court of Illinois.

Respectfully submitted,

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April, 1955

APPENDIX.

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OPINION OF HONORABLE JOHN F. HAAS, SUPERIOR COURT OF COOK COUNTY, TRIAL JUDGE.

Elmer J. Schnackenberg, Plaintiff
vs. Roland Towle, Defendant.

Opinion Filed October 31, 1952.

In May of 1945, the Norton Company, a Massachusetts corporation, engaged in the manufacture of grinding machines, wheels and abrasive products, inquired of the plaintiff, Schnackenberg, whether he could handle their claim on file in the Department of Revenue of the State of Illinois, asking for a refund on account of Retailers' Oc-

cupational Tax which they alleged was erroneously charged to them any by them paid to the State of Illinois. The principal issue was whether or not certain business transactions engaged in by the Norton Company and its customers constituted interstate commerce.

At that time Schnackenberg was a practising attorney and had been so engaged for a period of years as a member of the Illinois State Bar. He informed the representative of the company that he was in a position to handle it, but in view of the fact that he was about to be elected a Judge of the Circuit Court, said election to be held on June 4, 1945, that he would have to have their permission to have the assistance of another lawyer; that he suggested the defendant, Roland Towle, by name, stating that he was his partner in the practice of the law for some years and that all documents and court proceedings would have to be filed and handled by said Towle under the partnership name of Hansen and Towle. That said Schnackenberg assured the representative of the company that he would assume the entire responsibility of handling it. That this was entirely agreeable to the representative of the company is evidenced by the fact that on June 4, 1945 the Norton Company by mail requested that an appearance be filed on its behalf in the Department of Revenue, which letter was addressed to said Schnackenberg.

Schnackenberg discussed the matter of this employment with the said Towle whereupon they then and thereupon entered into a joint adventure agreement signed by both of them on June 11, 1945, and which contract read as follows:

> "It is agreed that Roland Towle will assist Elmer J. Schnackenberg in the handling of the Norton Company claim against the State of Illinois and that the fees arising therefrom shall be divided one-third to Mr. Towle and two-thirds to Mr. Schnackenberg, and

that Mr. Towle may handle said claim of record in the name of Hansen and Towle.

It is further agreed that Mr. Schnackenberg will render all required service in handling this claim."

The evidence shows clearly that Schnackenberg collaborated with the said Towle in all of the proceedings that transpired before the Department of Revenue and upon the various appeals arising from the ruling of that Board, in the Circuit Court of Sangamon County, the Supreme Court of Illinois and the United States Supreme Court.

Later, the question of fees received by the said Towle and their division with the said Schnackenberg arose, which resulted in the filing of the bill of complaint herein by the said Schnackenberg, wherein he demanded an accounting by the said Towle of the monies received by him for the legal services rendered to said Norton Company.

The answer filed by Towle admitted the execution and signing of their contract of June 11, 1945 but alleged that on June 15, 1945, the said plaintiff qualified as a Circuit Judge of Illinois and that on that date said Schnackenberg terminated the aforesaid contract; further that he the defendant and not the plaintiff prosecuted the claim of the Norton Company before the Department of Revenue and in the following courts aforesaid; and that the only services rendered by the plaintiff Schnackenberg were performed during the period from June 6 to June 15 when the plaintiff became a Circuit Judge.

The answer of Towle and the evidence further discloses that Towle received the sum of Ten Thousand Dollars ($10,000.00) on February 14, 1946 but did not communicate the receipt of this sum to Schnackenberg until some time later; that in January of 1947 and upon the insistence of the plaintiff that the terms of their agreement be adhered

to, said Towle paid him the sum of Six Thousand Five Hundred Ninety-One and 42/100 ($6,591.42); and that later Towle received the sum of Fourteen Hundred Dollars ($1,400.00) from said Schnackenberg as a gratuity. After the claim of the Norton Company was finally concluded, Towle received from said Company the further fee of Forty Thousand Dollars ($40,000.00). Of this amount he refuses to pay any portion thereof to the said plaintiff.

The payment by Towle to Schnackenberg of two-thirds of the Ten Thousand Dollars ($10,000.00) portion of the Fifty Thousand Dollars ($50,000.00) fee seemingly refutes the contentions of Towle that Schnackenberg had not performed any part of the services rendered; and that their contract of June 11, 1945 had been terminated by Schnackenberg on June 15, 1945.

However, in order to clarify the situation herein, it might be well to cite some of the principles of law applicable to the present situation.

1. A joint adventure has been aptly defined as an association of persons to carry out a single business enterprise for profit.

2. A joint adventure is founded entirely on contract, express or implied.

3. And it is generally held that one joint adventurer may be intrusted with the actual control of the enterprise without changing its status as a joint adventure.

4. To constitute a joint adventure the parties must combine their * * * efforts, skill or knowledge in some common undertaking, and the contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each adventurer of something promotive of the enterprise.

(30 Am. Jur., Sec. 10, p. 681.)

Rae v. *Cameron, et al.*, 112 Montana 159-169.

Parker v. *Trefoy, et ux.*, 136 Pac. (2) 55 Cal.

These principles encompass the situation thus far, to-wit: a joint adventure created by the contract of Towle and Schnackenberg wherein Towle was intrusted with the actual control of the proceedings relative to the claim of the Norton Company; and wherein each made contributions of time and learning for the promotion of the undertaking and in which they owed to each other the duty to observe the utmost good faith in all that related to their common interest throughout the entire transaction.

The defense of Towle to the claim of Schnackenberg for a two-third portion of the Forty Thousand Dollars ($40,000.00) is three-fold.

1st. That Schnackenberg Terminated the Contract of June on June 15, 1945.

The court regards this defense in the light of the evidence of the services rendered by Schnackenberg throughout the entire proceedings; and the fact of the division of the Ten Thousand Dollars ($10,000.00) portion of the fee in January of 1947, as per their contract, as untenable.

2nd. That Schnackenberg Rendered No Services After June 15, 1945.

This contention in the light of the evidence is likewise untenable and this defense must be overruled.

3rd. That the Contract or Joint Adventure of June 11, 1945 Was and Is Void, as Being Against Public Policy.

a. If the contract is against public policy the equitable doctrine of unclean hands or the principle of *pari delicto* applies.

b. That Towle as well as Schnackenberg stands in *pari delicto.*

c. That they both stood in *pari delicto;* this being

a contract between two lawyers; and not that of a layman and a lawyer.

d. That since they both stand in *pari delicto* or come into a court of chancery with unclean hands, the court of equity would leave them in the position that they placed themselves.

e. That this would give Towle the whole Forty Thousand Dollars ($40,000.00) without any legal obligation on his part to divide the same with Schnackenberg as per their agreement.

The legal presumption is that in all written contracts the party read the instrument, was familiar with the provisions thereof and that he assented thereto at the time of the signing. The defense now interposed is that the contract was against public policy, which because of its alleged *mala fides*, removes therefrom the application of the doctrine of estoppel.

To sustain his contention Towle bases his grounds upon the fact that Schnackenberg was elected on June 4, 1945 and sworn in as a Judge of the Circuit Court of Cook County on June 15th. That as a Judge of said Circuit Court and as an employee of the State of Illinois, he could not act as a counsellor or legal adviser to Towle, in the prosecution of the claim of the Norton Company against the State for a refund of taxes paid to the State and by it allegedly illegally levied. That Schnackenberg as a Judge stands in a fiduciary relation to the State and should not assist in a depletion of the funds from which he draws his salary.

Under two Illinois decisions predicated upon our constitution and our statutes, and which decisions stand unreversed, the contention of counsel for the defendant as to the illegality of the contract of June 11, 1945 cannot be maintained. These decisions definitely hold that it was not

illegal for Schnackenberg to perform legal services either in an advisory capacity or even as an attorney for the Norton Company after he ascended the bench as a Judge of the Circuit Court in litigation not pending in the Circuit Court of Cook County.

The right of a judge to practice law is definitely settled by the following:

Section 16 of Article VI of the Constitution of Illinois.

Section 10, Chapter 13, Illinois Revised Statutes.

Town of Bruce v. *Dickey*, 116 Ill. 527, 6 N. E. 435.

O'Hare v. *Chicago Railway Co.*, 139 Ill. 151, 28 N. E. 923.

The constitutional provision above cited is as follows:

> "S. 16. From and after the adoption of this constitution, judges of the circuit courts shall receive a salary of $3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be, respectively, elected; and from and after the adpotion of this constitution, no judge of the supreme or circuit court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments."

This constitutional provision was interpreted by the Supreme Court of Illinois, in *Town of Bruce* v. *Dickey*, 116 Ill. 527. The Supreme Court of Illinois held that Section 16 of Article VI of the Constitution does not prohibit a judge from practicing law. The court reversed the judgment which denied recovery by the plaintiff Dickey, a lawyer, for legal services performed for the defendant, the Town of Bruce, Illinois, on the ground that he was a judge during the time the legal services were performed. This

decision of the Supreme Court stands as the law of Illinois with respect to the meaning and application of the constitutional provision above quoted.

The statutory provision above cited is as follows:

> "10: Who not to practice as attorney.) S. 10. No person who holds a commission as a justice of the Supreme Court of the State of Illinois or as a judge of any court of record in this State shall be permitted to practice as an attorney or counsellor at law in the court in which he is commissioned or appointed, and it shall be unlawful for any county judge, probate judge county or probate clerk, or deputy county or probate clerk to make accounts current or reports for any executor, administrator, guardian or conservator, in which said court shall have to act on judicially, nor shall any coroner, sheriff or deputy sheriff be permitted to practice as aforesaid in the county in which he is commissioned or appointed, nor shall any clerk or deputy clerk of a court of record be permitted to practice as an attorney or counsellor at law in the court in which he is such clerk or deputy clerk, and no person shall be permitted or suffered to enter his name on the roll or record to be kept as aforesaid, by the clerk of the Supreme Court, or do any official act appertaining to the office as an attorney or counsellor at law, until he hath taken the oath hereinbefore required; and the person administering such oath shall certify the same on the license, which certificate shall be a sufficient voucher to the clerk of the Supreme Court to enter or insert, or permit to be entered or inserted, on the roll of attorneys or counsellors at law, the name of the person of whom such certificate is made."

In *O'Hare* v. *Chicago Railway Co.*, 139 Ill. 151, this statutory limitation was interposed to prevent E. H. Gary, then the county judge of Du Page County, from appearing in court as attorney for the plaintiff in a proceeding in the County Court of Cook County, Illinois. The court held that Judge Gary could practice law in the County

Court of Cook County while he was a judge of the County Court of Du Page County. This case has never been overruled or modified and therefore stands as the law of Illinois with respect to the right of a judge to practice law and with respect to the limitation imposed by Section 10, Chapter 13, of the Illinois Revised Statutes.

In the case of *Town of Bruce* v. *Dickey,* 116 Ill. 527, (at 534f) the Court said:

> "The plaintiff was elected a judge of the Supreme Court of Illinois in December, 1875, and had ever since, to the time of the trial, held that office. The greater part of the services for which he recovered were rendered after he became such judge. The point is made that a judge of the Supreme Court is prohibited by the constitution of this State from practicing law for compensation. In support of the position is cited Section 16, of article 6, of the constitution of 1870, which, after fixing the salaries of the judges of the Supreme and Circuit Courts, reads as follows: 'And from and after the adoption of this constitution, no judge of the Supreme or Circuit Court shall receive any other compensation, perquisite or benefit, in any form whatsoever nor perform any other than judicial duties to which may belong any emoluments.' The words that 'no judge of the Supreme or Circuit Court shall receive any other compensation, perquisite or benefit, in any form whatsoever,' are not depended upon for the alleged inhibition, as manifestly they should not be; but it is the last clause, 'nor perform any other than judicial duties to which may belong any emoluments,' which is relied upon as containing the prohibition. These words naturally refer to official services, or to services required by law to be done, and not to work done by employment under a private contract. It is the performance of duties which is prohibited—a term which is suggestive of office. It is duties to which belong emoluments. The word 'emoluments' is peculiarly appropriate to office, denoting, in its most ordinary signification the profit 'which is annexed to the possession of office, as sal-

ary, fees and perquisites.' And it is emoluments which belong to the performance of duties—the word 'belong,' implying fixed, prescribed by some regulation,—as are the emoluments attached to office, and not something contracted to be paid by agreement between private parties. This analysis of the language of this clause shows its fitness as prohibiting the performance of any official duties, or duties imposed by law, to which any emoluments are attached, and that it is quite inappropriate language in which to couch a prohibition to conduct a law suit, or to perform any other work than judicial duties, under a private contract for a compensation to be paid. Had it been the intention to prohibit judges from doing any other work for pay, it could easily have been so said in plain terms, and we cannot conceive that the cumbersome and inapt phraseology in question would have been used to express that purpose."

In the case of *O'Hare* v. *Chicago Railway Co.*, 139 Ill. 151 (at 154f), the Court said:

"* * * A colloquy ensued between court and counsel, from which it appears that Judge Gary had a law office in Chicago and was in the regular practice there, and had, at the request of the county judge of Cook Count, presided in that court in the trial of particular cases; that there was no arrangement for the trial of cases by him in the future; that when requested in the past to try particular cases, he would consent or refuse, as his business occupations would permit. The court overruled the motion.

"It is insisted that the attorney fell within the prohibition of section 10 chapter 13, of the Revised Statutes, which is as follows: 'No person who holds a commission as a justice of the Supreme Court, or as a judge of any court of record, shall be permitted to practice as an attorney and counsellor at law in the court in which he presides.' Any county judge in the State, in case of the absence, death, resignation or inability of the judge of the county court in any county, may hold the same, and perform all the duties of the

judge thereof during such absence, vacancy or disability. (Act of 1885, 3 Starr & Curtis, 152.) So, also, county judges may interchange with each other, as circuit judges may do, and 'hold court for each other, and perform each other's duties, when they find it necessary or convenient.' (Act of 1879, Starr & Curtis, 731.) While a judge was so presiding he would manifestly be inhibited from practicing as an attorney therein. The practice is one not to be commended, because of the tendency to bring the administration of the law into disrepute and contempt; yet we think the mere fact that at some time in the past, how remote does not appear, the judge had presided in particular cases, will not necessarily disqualify him to appear in the court as an attorney. There is no pretense that he had presided or would preside at that term of court. At the term in question he had no control of the records of the court. No juror or officer of the court was subject to his control, or influence, so far as appears from this record, nor were any facts set up in support of the motion, showing or tending to show that by reason of his having presided in the court appellant would be prejudiced if he was permitted to appear as attorney for appellee. We are of the opinion that, under the facts shown, the attorney here sought to be excluded did not fall within the statutory inhibition."

These cases are determinative of the issues herein and the Court finds that the equities are with the plaintiff and that he shall recover from the said defendant two-thirds of said Forty Thousand Dollars ($40,000.00) as per their contract of joint adventure.

The motion of the defendant for summary judgment be and the same is hereby denied.

Prepare a decree accordingly.

OPINION OF APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

Docket No. 46046—November 16, 1953.

Elmer J. Schnackenberg, Appellee, v. Roland Towle, Appellant.

Mr. Justice Friend Delivered the Opinion of the Court.

Plaintiff was elected judge of the Circuit Court of Cook County, Illinois on June 4, 1945. Prior to his election he had, since 1912, practiced law in Chicago and had, for many years, been a representative in the General Assembly of Illinois, serving as speaker of the House during one or two sessions. In the course of his practice and as a legislator, he gained considerable experience in cases involving the Illinois Retailers' Occupation tax. In the latter part of May 1945—which predated his election to the bench—he received an inquiry from the Norton Company of Worcester, Massachusetts, concerning his employment as attorney, which later became the subject matter of the joint venture here involved. He agreed to represent the company, but with the reservation that while he would accept full responsibility for handling the matter, since he was about to be elected as a judge of the Circuit Court of Cook County, all appearances in the Department of Revenue and in court would be made by and in the name of his associate, Roland Towle, the defendant here. Plaintiff's retainer was confirmed by letter of the Norton Company, dated June 4, 1945, and received by plaintiff one or two days later. On June 11, 1945 plaintiff and defendant executed the following agreement: "It is agreed that Roland Towle will assist Elmer J. Schnackenberg in the handling of the

Norton Company claim against the State of Illinois and that the fees arising therefrom shall be divided one-third to Mr. Towle and two-thirds to Mr. Schnackenberg and that Mr. Towle may handle said claim of record in the name of Hansen & Towle. It is further agreed that Mr. Schnackenberg will render all required service in handling this claim."

The claim of the Norton Company had originally been filed December 26, 1944 with the Department of Revenue of the State of Illinois, alleging payment of sales tax on items not covered by the act and asking for an allowance of credit in the sum of $100,692.01. Following a tentative denial of the claim on May 3, 1945 by the department, the Norton Company, one week later, filed its protest, accompanied by a demand for a hearing thereon. Subsequently it retained plaintiff and defendant to act as its attorneys in the matter. The claim was prosecuted through the Department of Revenue, the Circuit Court of Sangamon County, the Supreme Court of Illinois and the Supreme Court of the United States to final judgment. The litigation extended over a period of five years and eight months. During that time plaintiff continued to be a judge of the Circuit Court of Cook County.

The Norton Company paid legal fees and reimbursement for out-of-pocket expenses, but defendant, who received the payments, refused to account to plaintiff, except with respect to the first fee payment in the amount of $10,000.00. The chancellor found the accounting was due, stated the account to be in favor of plaintiff in the amount of $26,741.91, with interest from June 25, 1951, and entered a decree thereon in favor of plaintiff, from which defendant appeals.

Immediately following his employment by Norton Company, plaintiff began to work on its claim for credit for

tax illegally exacted, as it alleged, by the State of Illinois. He and defendant consulted constantly with respect to all phases and all steps in the prosecution of the claim, including audits, classification of transactions, hearings in the Department of Revenue, and all pleadings and briefs filed in court, as well as the preparation for all hearings and arguments. However, plaintiff did not appear at any of the hearings or arguments, nor did his name appear in the records or on any document or brief filed in the Department of Revenue or in any court. After the litigation was concluded, plaintiff and defendant consulted in the preparation of a communication to the client analyzing the decision of the Supreme Court of the United States and advising the client how and to what extent it applied to its interstate transactions. Finally, plaintiff consulted with defendant as to the final fee which should be charged for all services rendered. In prosecuting the claim plaintiff performed all the services required of him and fully performed his agreement with defendant. Defendant evidently recognized the agreement and, as stated, paid plaintiff his proportionate share of the $10,000.00 fee received in 1946.

It is clear upon the record that when plaintiff was retained by the Norton Company and at the time he asked defendant to become associated with him in handling the matter, both parties knew that plaintiff would soon be elected a judge, and the agreement was undoubtedly drafted and executed with that eventuality in mind; and the testimony of the witnesses and the finding of the chancellor show that the arrangement was carried out without deviation.

Defendant now seeks to avoid an accounting of the proceeds of the joint venture on the ground of illegality. It is urged that the contract was void for any one of the

following principal reasons: (1) that plaintiff's participation in the case when it was before the Circuit Court of Sangamon County constituted practice as an attorney in the court in which he was commissioned; (2) that the agreement whereby plaintiff undertook, for personal gain, to render services as an attorney at law on behalf of the claimant in litigation, is violative of the constitution of Illinois which circumscribes the activities in which a judge may lawfully engage during his term of office, and is contrary to the public policy of the State; and (3) that plaintiff, being a judge of a court of general jurisdiction, was disqualified to act as an attorney at law in any forum.

The defense that plaintiff's participation in the case when it was before the Circuit Court of Sangamon County constituted practice as an attorney in the court in which he was commissioned, is predicated on the premise that there is only one Circuit Court in the State of Illinois and that plaintiff is commissioned a judge of that one Circuit Court. It is indisputable that the Circuit Court of Cook County is a part of the judicial system of the State, but that it is separate and distinct from other courts in that system is illustrated by numerous references in the constitution of Illinois where, referring to Circuit Courts, the plural term is constantly used. Thus, Article VI, section 1 provides that "the judicial powers * * * shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns." Article VI, section 12 provides that "the circuit courts shall have original jurisdiction of all causes * * *. The terms of office of judges of circuit courts shall be six years." Section 15 of the same article states that "the general assembly may divide the state into judicial circuits * * *, and provide for the election therein, severally, by

the electors thereof * * * of not exceeding four judges, who shall hold the circuit courts in the circuit for which they shall be elected"; and section 23 of the article provides that "the county of Cook shall be one judicial circuit. The circuit court of Cook county shall consist of five judges * * *." We think these constitutional provisions show that the Circuit Court of Cook County is separate and distinct from the other Circuit Courts in the State.

The constitutional provision relied on as prohibiting a judge from practicing law during his term of office reads as follows: "From and after the adoption of this constitution, judges of the circuit courts shall receive a salary of $3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be, respectively, elected; and from and after the adoption of this constitution, no judge of the supreme or circuit court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments." (Art. VI, sec. 16, Constitution of 1870.)

This provision was interpreted by the Supreme Court of Illinois in *Town of Bruce* v. *Dickey* (1886), 116 Ill. 527, as not prohibiting a judge from practicing law. The court reversed the judgment of the trial court which had denied recovery to plaintiff Dickey for legal services performed for the defendant, the Town of Bruce, on the ground that he was a judge of the Supreme Court of Illinois at the time the legal services were performed. The Supreme Court decision also holds that there is no general prohibition in Illinois against a judge's practicing law—with the limitation of course that he may not practice in the court for which he is commissioned. The decision in the *Dickey* case has never been reversed or modified.

O'Hare v. *C. M. & N. R. R. Co.* (1891), 139 Ill. 151, decided five years later, affords a further expression of the Supreme Court on this question. The limited prohibition of section 10, Chapter 13 of the Revised Statutes was there interposed in an attempt to prevent E. H. Gary, then the county judge of Du Page County, from appearing in court as attorney for a plaintiff in a proceeding in Cook County, Illinois. The applicable portion of section 10 provided that "no person who holds a commission as a justice of the Supreme Court, or as judge of any court of record, shall be permitted to practice as an attorney and counselor at law in the court in which he presides." The court there pertinently observed that "while a judge was so presiding he would manifestly be inhibited from practicing as an attorney therein," and then added that "the practice is one not to be commended, because of the tendency to bring the administration of the law into disrepute and contempt; yet we think the mere fact that at some time in the past, how remote does not appear, the judge had presided in particular cases, will not necessarily disqualify him to appear in the court as an attorney. There is no pretense that he had presided or would preside at that term of court"; and concluded that "under the facts shown, the attorney [Gary] here sought to be excluded did not fall within the statutory inhibition." This case also has never been overruled or modified.

It will be noted that at that time section 10 of the statute prohibited a judge from practicing law in the court in which he *presided*. Shortly after the decision of the Supreme Court in the *O'Hare* case the statute was amended to prohibit judges from practicing in courts in which they were *commissioned*. This in effect made the amended statute more specific. It had been contended in the *O'Hare* case that Judge Gary could not practice in the County Court of Cook County because he had at times held court there as a

visiting judge, a practice which has persisted and been sanctioned throughout the years. The court held that this did not bar him. By the amendment the statute was narrowed to the construction placed on it by the Supreme Court and so as to make it clear that the disqualification applied only to the county court in which the judge was *commissioned* and not to any other court where he may have *presided* from time to time by invitation.

Related to the last contention is defendant's argument that the agreement in question is against public policy and therefore illegal. Defendant cites numerous cases in various jurisdictions involving contracts of employment held to be against public policy. The law in Illinois is fairly well settled, however, that as applied to contracts, the constitution, the statutes and decisions of the State courts are the proper determination for its public policy, and that the courts will not resort to other sources for the determination of that question. In *Zeigler* v. *Illinois Trust and Savings Bank* (1910), 245 Ill. 180, the court held that the public policy of the State or the nation is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials. See also *Groome* v. *Freyn Engineering Co.* (1940), 374 Ill. 113, which involved an agency contract between the litigants. It was claimed that the contract contemplated performance in Russia and that by the law of Russia an agency contract, involving the use of middlemen or agents is void. The court held that the question in this regard must be determined by the public policy of Illinois and not the policy of Russia, and quoted with approval from the *Zeigler* opinion.

We think *Bruce* v. *Dickey* and *O'Hare* v. *Chicago Railway Co.*, are controlling and determine the public policy of the State. No Illinois decisions to the contrary have been cited

by defendant in support of his contention that plaintiff has violated the public policy of Illinois.

We have considered other questions raised, but in the view we take it will be unnecessary to discuss them. We are of opinion that the chancellor correctly decided the case, both with respect to the facts and the law; therefore the decree entered should be affirmed, and it is so ordered.

DECREE AFFIRMED.

NIEMEYER, *P. J.*, and BURKE, *J.*, Concur.

OPINION OF SUPREME COURT OF ILLINOIS AS REVISED UPON DENIAL OF PETITION FOR REHEARING.

Docket No. 33145—Agenda 25—May, 1954.

Elmer J. Schnackenberg, Appellee, v. Roland Towle, Appellant.

PER CURIAM: We have granted leave to appeal in this cause which involves a suit in chancery filed in the superior court of Cook County by Elmer J. Schnackenberg, appellee, against Roland Towle, appellant, for an accounting to recover two thirds of a $40,000 attorney fee paid appellant for services alleged to have been jointly rendered a foreign corporation in prosecuting a claim against the State of Illinois for a refund of certain taxes. It appears that the claim was prosecuted through the Department of Revenue, the circuit court of Sangamon County, this court and the United States Supreme Court, with all appearances being made by appellant under a written agreement which provided that appellee would render all required service in handling the claim and that appellant would assist him. The circumstances under which the agreement arose need

not be detailed in this opinion for they more fully appear in *Schnackenberg* v. *Towle*, 351 Ill. App. 497, 115 N. E. 2d 813.

The recital of the facts contained in the Appellate Court opinion is inadequate in one respect. By supplement we might add that the appellee, on June 6, when he received the letter from the Norton Company, the corporation involved in the tax claim, stated that the case would be handled the same as the "Tool and Die Workers case." In that case there was filed a claim against the Department of Revenue, the filing of an injunction, one court appearance, and an agreed decree. Contrary to the expectation of the parties hereto, the Norton case was not disposed of in the brief and simple way as contemplated. The appellant, in the prosecution of the Norton claim, performed all the services necessarily required before the Department of Revenue, the circuit court of Sangamon County, this court, and the Supreme Court of the United States. Appellee was not in a position to be of much assistance to appellant, and he contributed very little to assist in the labors and responsibilities of following the Norton litigation through all the courts of the land. The contract under scrutiny here was entered into with the firm belief that the Norton case could be settled quickly and profitably, just like the Tool and Die Workers case. But that is not what transpired. The Appellate Court, in its opinion in this case, states that the appellee fully performed his agreement with appellant, and that the latter seeks to avoid an accounting of the proceeds of the joint venture on the ground of illegality. This interpretation of the record reflects most unfavorably upon appellant. He is placed in the role of a welsher. A careful study of the record does not sustain such a conclusion.

Appellant admitted the fee-sharing agreement but defended against it on the ground that it had been breached

by appellee; that it was illegal and contrary to public policy in that appellee, a circuit judge at the time it was entered into, committed a breach of trust when he undertook, while in office, to perform legal services for a client whose claim was adverse to the interest of the State of Illinois; that appellee, as a circuit judge, is disqualified from practicing law; and that a judge of the circuit court is forbidden by statute from practicing law in any judicial circuit of this State.

The trial court found the issues for appellee and stated in a written opinion that *Town of Bruce* v. *Dickey*, 116 Ill. 527, and *O'Hare* v. *Chicago, Madison and Northern Railroad Co.*, 139 Ill. 151, were determinative of the issue that appellee as a circuit judge was not prohibited from practicing law, except in the court in which he was commissioned, namely, the circuit court of Cook County. On appeal, the Appellate Court affirmed, its opinion stating that the public policy of this State with reference to judges practicing law was determined by the same cases. Our concern over questions relating to the rights and conduct of a circuit judge prompts our review of the case.

Appellee was undoubtedly practicing law while engaged in the joint retainer at a time when he was a judge of the circuit court of Cook County, and it would appear, from the terms of the agreement whereby he avoided personal appearances in connection with the claim, that he was at least apprehensive of some limitation on the extent to which he could pursue the matter. While it is true the *Dickey case*, decided in 1886, determined that there is no constitutional prohibition which bars a judge from practicing law, and that the *O'Hare case*, decided in 1891, established that a county judge was prohibited, under the existing statute, only from practicing law in a court in which he presided, we do not subscribe to the conclusion that the two cases are today determinative in the matters of public policy arising under the facts of this case.

There is no precise definition of public policy, and consequently no absolute rule of admeasurement, making it necessary to judge and determine each case, as it arises, according to its own peculiar facts and circumstances. It has often been said that the public policy of the State is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of government officials. Courts will not look to other sources to determine the public policy of a state. (*First Trust and Savings Bank* v. *Powers*, 393 Ill. 97; *Ziegler* v. *Illinois Trust and Savings Bank*, 245 Ill. 180.) Looking to questions of contract generally, we have uniformly held that where a contract is illegal or against public policy a court of equity will not, at the instance of one of the parties who participates in the illegal or immoral intent, either compel the execution of the agreement or set it aside after it has been executed, because to give relief in such a case would injure and counteract public morals. The application of the rule is not in the interest of any party to the transaction but in the interest of the general public and, once the point appears, it is the duty of this court to apply the rule even though it is not urged by either party. (*Vock* v. *Vock*, 365 Ill. 432.) In view of the latter rule, our consideration is not confined to the isolated question of whether a circuit court judge may practice law, but must also extend to a determination of whether the agreement of the parties, under the circumstances that one of them was a judge, was so pregnant with evil as to be against public policy.

In the *Dickey case*, where the meager remuneration of the office was a definite factor, this court stated that while "Propriety may forbid a judge of the Supreme or circuit court from practicing law, as not being congruous with the judicial office, * * * we find no constitutional prohibition

against it." Where, however, the remuneration is generally deemed adequate, as is the case with judges of the Supreme Court and the courts of general original jurisdiction, and as may be the case with judges of other courts, inadequate remuneration no longer compels a deviation from propriety, or sanction of, a practice incongruous with the judicial office. When the reason for a rule disappears, the rule itself should disappear.

Again in the *O'Hare case,* although this court held that a county judge acting as an attorney did not, in that case, come within the statutory inhibition against practicing law "in the court in which he presides," it was stated: "The practice is not one to be commended, because of the tendency to bring the administration of the law into disrepute and contempt." We do not think that either result inferentially approves the practice of law by supreme or circuit judges and certainly, since each was decided upon its own peculiar facts, they do not preclude this court, in a proper case, from imposing additional restrictions to prevent the practice of law and the courts of justice from becoming objects of scandal or suspicion. Apart from our decisions which have constantly striven to maintain the fidelity and integrity of the courts and the confidence of the public whom they serve in a position of trust, we think that the legislature, too, has manifested a changing policy since the advent of the *O'Hare* decision.

Immediately following that case, the legislature amended section 10 of the Attorneys and Counselors Act, which had formerly prohibited certain judges from practicing as an attorney "in the court in which he presides," to its present form which prohibits a judge of any court of record from practicing as an attorney "in the court in which he is commissioned or appointed." (Laws of 1895, p. 79; Ill. Rev. Stat. 1953, chap. 13, par. 10.) In its review of this cause, the Appellate Court interpreted the amendment as

narrowing the statute to make it clear that the disqualification applies only to the particular court, as defined by territorial boundaries, in which the judge is commissioned and has no application to courts where he might have presided, or could be called upon to preside, from time to time. However, when the amendment is measured in the light of this court's injunction that such practice, because of its tendency to bring the administration of the law into disrepute and contempt, was not one to be commended, it is difficult to conceive that the construction arrived at reflects the true legislative intent. In reaching its result the Appellate Court rationalized that the circuit court of Cook County was separate and apart from the other circuit courts of the State and that, since appellee was commissioned a judge of that court, the statutory inhibition extends only to prohibit his practice of law in that specific court. We, however, find but little justification for such a conclusion and think it manifest that such an isolated restriction was not intended by the legislature.

While the circuit court of Cook County may be territorially apart, it is still but a unit in the State-wide judicial system of circuit courts. One commissioned as a circuit judge is not confined to performing his office within the territorial limits of the circuit where elected but is expressly authorized, and sometimes required, to sit in other circuits within the State. (See Ill. Rev. Stat. 1953, chap. 37, pars. 72.29 and 72.30.) When he does so, he has all the powers of the regularly elected judges of the circuit. (*Jones* v. *Albee*, 70 Ill. 34, 40; *Pike* v. *City of Chicago*, 155 Ill. 656, 658.) These powers of interchange among circuit court judges existed when section 10 was amended in 1895 and the legislature is thus presumed to have known that the commission issued to a circuit judge qualified him to sit as judge in any circuit within the State circuit court system. Since the same evils would attend the judge's prac-

ticing law in any circuit where he was qualified to preside, we conclude that the legislative inhibition was directed to the broad aspects of his commission and was not intended to apply only in the circuit from which he was elected. Thus construed, it is apparent that the decision in the *O'Hare case* is not presently determinative of the public policy with regard to judges practicing law and that, even in the absence of other considerations, appellee was disqualified from acting as attorney when the tax claim was prosecuted in the circuit court of Sangamon County.

A further crystallization of the changing legislative view on the question is found in section 10 of the act in relation to a municipal court in the city of Chicago. (Ill. Rev. Stat. 1953, chap. 37, par. 365.) In 1931, the section, which deals with the qualifications for judges of that court, was amended to provide that no judge shall, during the term of his office, "engage, either directly or indirectly, in the practice of the law." (Laws of 1931, pp. 423-424.) While the prohibition therein is not conclusive as against judges of the circuit court, it represents the latest declaration of legislative policy on the subject that we have found and is persuasive, when the constitutional need for consistency in classifications is considered, that such a policy, as the most recent expression of the legislature, asserts its present view of the matter.

When the foregoing manifestations of the legislature are coupled with the judicial decisions of this court which have long maintained the policy that the integrity and honor of courts, and of lawyers, who are officers of the court, be maintained free from scandal or suspicion of improper conduct, we think it manifest that the agreement sued upon is, under the circumstances, contrary to the public interest and good. We are not limited to the narrow criterion of a specific decision in looking to the public policy applicable to such conduct of judges or other public

officials. It is stated in 17 C. J. S., Contracts, sec. 212, that "A people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments." Conversely, the governmental official holds a position of public trust, and his conduct is to be measured by the highest of standards. It has been with these principles in mind that this court has consistently looked with disfavor upon any conduct tending to bring our courts into public suspicion and disrepute. Thus in the *Dickey* case it was said that the judge's action of practicing law was a breach of propriety; in the *O'Hare* case we said it was a practice not to be commended because of its tendency to bring the administration of justice into contempt; in *Evans* v. *Funk*, 151 Ill. 650, 658, we condemned a county judge, before whom the estate was pending, for representing a client in a will contest in the circuit court, saying that our decision arose "from the strongest necessity of upholding the principles of public policy in maintaining the purity and honor of the courts of justice free from all scandal or suspicion of improper conduct on the part of the judges;" and, most recently, in *London & Lancashire Indemnity Co.* v. *Tindall*, 377 Ill. 308, this court expressed its displeasure at the name of a circuit judge appearing as of counsel on briefs filed in this court.

We agree with appellant that the policy of keeping our courts free from suspicion would be difficult, if not impossible, to maintain if this court gave judicial sanction to one whom the people have elected a judge, with State-wide power, to engage for personal gain in the partisan practice of law. While we entertain no doubts that appellee accepted his employment in complete good faith and that he did not use his office to further it, such circumstances do not change the fact that the agreement, and

the manner in which it was carried out, was of a nature easily calculated to cause suspicion and distrust in the minds of the public and, in the hands of a less honorable person, could have resulted in public harm. The law, however, will not concede to any man, regardless of how honest he may be, the privilege of making a contract which it would not recognize when made by designing or corrupt men. (*Jamieson* v. *Iles,* 219 Ill. App. 432, 443.) To the extent that *Town of Bruce* v. *Dickey,* 116 Ill. 527, and *O'Hare* v. *Chicago, Madison and Northern Railroad Co.,* 139 Ill. 151, are in conflict with the views expressed in this opinion, they are expressly overruled.

We conclude, therefore, that the agreement contemplating that appellee, while holding the office of judge, should perform legal services on behalf of a client is, because of its tendency to bring the administration of justice into suspicion and disrepute, contrary to the public policy established by the judicial decisions of this court. Since this is so, and because it appears that the parties stood on equal footing in making the agreement, we will not, in the interest of the public, give relief to either party. *Vock* v. *Vock,* 365 Ill. 432.

The judgment of the Appellate Court for the First District and the decree of the trial court are reversed.

JUDGMENT AND DECREE REVERSED.

MR. JUSTICE KLINGBIEL took no part in the consideration or decision of this case.

MR. JUSTICE MAXWELL, dissenting.

RELEVANT PARTS OF CONSTITUTION OF ILLINOIS (1870).

Art. VI, §§ 16 and 23

§ 16. "* * * And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be, re-

spectively, elected; and from and after the adoption of this constitution, no judge of the supreme or circuit court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments."

§ 23. "The county of Cook shall be one judicial circuit. * * *"

RELEVANT PARTS OF ILLINOIS REVISED STATUTES.

Ch. 13, § 1

§ 1. "* * * A license, as provided for herein, shall constitute the person receiving the same, an attorney and counsellor at law, and shall authorize him to appear in all of the courts within this State and there to practice as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State. No person shall be refused a license under this Act on account of sex. * * *"

Ch. 13, § 10

§ 10. "No person who holds a commission as a justice of the Supreme Court of the State of Illinois or as a judge of any court of record in this State shall be permitted to practice as an attorney or counsellor at law in the court in which he is commissioned or appointed, nor shall any judge of any county or probate court be permitted to practice in the court of which he is commissioned or appointed, and it shall be unlawful for any county judge, probate judge, county or probate clerk, or deputy county or probate clerk to make accounts currents or reports for any executor, administrator, guardian or conservator, in which said court shall have to act on judicially, nor shall any coroner, sheriff or deputy sheriff be permitted to practice as aforesaid in the county in which he is commissioned or appointed, nor shall any clerk or deputy clerk of a court of record be permitted to

practice as an attorney or counsellor at law in the court in which he is such clerk or deputy clerk, * * *."

MATERIAL PORTION OF JUDGMENT OF SUPREME COURT OF ILLINOIS REVERSING CASE (R. 13) ENTERED NOVEMBER 18, 1954.

"THEREFORE, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Appellate Court of the First District and the decree of the Superior Court of Cook County in this behalf rendered, BE REVERSED, ANNULLED, SET ASIDE AND WHOLLY FOR NOTHING ESTEEMED."

MATERIAL PORTION OF ORDER OF SUPREME COURT DENYING A REHEARING (R. 16) ENTERED JANUARY 18, 1955.

"And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause."

MATERIAL PORTION OF ORDER OF SUPREME COURT DENYING MOTION FOR RECONSIDERATION (R. 28) ENTERED FEBRUARY 14, 1955.

"IT IS ORDERED that the motion of appellee for reconsideration of the petition for rehearing be and it is hereby denied."